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NO. 95-2030

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HEDWIG R. SCHULZ a/k/a HEDY SCHULZ,
Petitioner

vs.

CITY OF VERNON; PAUL HAWKINS,
Individually and as Agent, Servant and Employee for
the CITY OF VERNON AND MARSHALL PYLANT,
Individually and as Agent, Servant, and
Employee for the CITY OF VERNON,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY PETITIONER

1. Is the Court still required to view all of the evidence in the light most favorable to the party opposed to the motion for summary judgment?

2. Has the standard of review of a summary judgment placed the Court in place of the jury and permit the Court to disregard any evidence it chooses and attempt to weigh credibility via affidavit?

3. Did the lower court err by viewing the evidence submitted in the light most favorable to the movant?

4. Did the lower courts err by disregarding the non-movants evidence in reviewing the motion for summary judgment?

PARTIES TO THE PROCEEDING

The parties to this proceeding all appear in the caption.

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The decision of the United States District Court for the Northern District of Texas, Wichita Falls Division is not reported. The District Court granted the Motion for Summary Judgment on the dual basis that the suit was barred by the applicable statute of limitations and that there was no violation of the ADEA by the Respondents. The date of the District Court's judgment was April 19, 1994. The United States Court of Appeals for the Fifth Circuit filed their opinion affirming the District Court's ruling on January 12, 1995.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals was entered on January 12, 1995. This Court has jurisdiction to review the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Age Discrimination in Employment Act of 1967 (ADEA) 29 U.S.C. §255 et seq.

2. Portal to Portal Act 29 U.S.C. § 255(a) (statute of limitations for ADEA actions)

STATEMENT OF THE CASE

Respondents would disagree with the Statement of the Case as set forth by Hedwig Schulz ("Schulz") in her Petition for Writ of Certiorari. Other than the fact that this is an age discrimination case which was brought by Schulz under the Age Discrimination and Employment Act of 1967 (ADEA), as amended 29 U.S.C. §621 et seq., and the fact that Schulz had been an employee of the City of Vernon, Texas, for just under eleven years, the rest of the Petitioner's Statement of the Case is pulled directly from the Argument portion of the Petitioner's

Brief to the Honorable United States Court of Appeals for the Fifth Circuit. Respondent would state that Petitioner's Statement of the Case is more applicably titled "Argument" and is misplaced as a Statement of the Case.

Hedwig R. "Hedy" Schulz ("Schulz") filed this lawsuit on September 29, 1992, claiming violations of the Age Discrimination in Employment Act (ADEA); intentional and negligent infliction of emotional distress; and negligent hiring, retention, and supervision of employee, Marshall Pylant ("Pylant"). She sought exemplary and compensatory damages and attorney fees. Schulz subsequently abandoned her claims against the City Manager, Paul Hawkins, and City of Vernon employee, Marshall Pylant.

Schulz is over forty years of age as required for protection under §631(a) of the ADEA. She was born on January 1, 1924, making her sixty-six years old at the time of the incident in question. She worked for the City of Vernon, Texas, for nearly eleven years before her retirement on September 29, 1990. Schulz signed retirement papers on September 18, 1990, which had an effective date of September 30, 1990. Schulz claimed in the courts below that her retirement amounted to a "constructive discharge." Subsequent to the time she signed her retirement papers and before her retirement took effect, she filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on September 20, 1990. On September 23, 1991, the EEOC denied her discrimination claim.

Between 1988 and 1990, the City of Vernon was in the process of downsizing its work-force. Thirteen jobs were eliminated or combined. Schulz was employed as a warehouse secretary by the City of Vernon. Although the City of Vernon does not have written job descriptions, Schulz' duties included answering the telephone, taking customer complaints, filling out complaint tickets, answering the base radio and dispatching trouble calls to Department Heads and/or workers, disbursing

bottled water to expectant mothers, typing letters and memos when needed for Department Heads, as well as distributing the memos, discharging monthly water and sewer reports and EPA reports, working up monthly work order lists and sending them to the Commissioners, producing Water Usage Reports, keeping records of vacation and sick leave for department employees, as well as maintaining time sheets, compiling a Vehicle Maintenance Schedule, and general office work such as sorting mail and typing letters and memos.

Jerry Hamilton ("Hamilton") reported to Paul Hawkins ("Hawkins") that Schulz had stated that she was not going to tell him when she would retire and that she just might wait until Rosa Alaniz ("Alaniz"), the other warehouse secretary, was on leave and one Monday morning not report back for work. Schulz describes this as a "joking" response. Her supervisors, however, found no humor in that response. Hawkins told Hamilton to remind Schulz that if she intended to retire, the retirement papers should be submitted thirty days before she left; and that if she intended to just not show up for work then perhaps it would be better for her to leave now. Hamilton spoke with Schulz again, and she informed him that she didn't know when she would retire.

Hamilton resigned soon after, in late January, and Marshall Pylant, who was the Special Services Superintendent, took on Hamilton's previous duties including supervising the secretaries. Hawkins announced this change in supervisors to Alaniz and Schulz. Hawkins' deposition reveals that Alaniz was receptive to the change in personnel, but that Schulz' only reply was, "Well, I don't intend to be overworked." Hawkins assured her that was not his intention and remarked that he doubted she would be overworked, since she currently had a great deal of free time.

Less that two weeks after the change in supervisors, Hawkins inquired of Pylant how things were progressing. Pylant indicated that Schulz was having difficulty with the

Vehicle Maintenance Report, and that it was taking her a day to a day and a half to complete it. He believed that it was not a complicated task, but that she did not want to do it. Pylant also reported that on several occasions when he had requested that Schulz type a report or complete other secretarial tasks, she would respond "no," "maybe," or "we'll see." This was particularly true concerning the Vehicle Maintenance Reports.

About three or four weeks later, Pylant found errors in the Vehicle Maintenance Reports Schulz had prepared, and he took the duty away from Schulz. He then gave the duty to one of his electricians, who was able to prepare the report accurately in no more than forty to forty-five minutes per day. Hawkins again inquired about how Pylant was getting along with Schulz. Pylant replied that Schulz had a very bad attitude, but he was trying to work through the problem.

In March and April of 1990, Alaniz took maternity leave. While Alaniz was on leave, Schulz did Alaniz' duties as well as her own, except for Alaniz' duties of completing purchase orders and paying bills. Schulz claims that she was able to do these two additional duties, but did not have enough time to complete them. On April 1, the City of Vernon contracted out their water delivery service to expectant mothers, because the contract saved the City money. This significantly reduced Schulz' duties.

On April 4, 1990, Schulz informed Pylant that her doctor had told her she should take two weeks off of work because of back problems. On April 11, 1990, a Wednesday, Schulz went to Hawkins' office complaining that Pylant had sent her home, and told her not to come back until Monday and that she would take the three days off without pay. She said that Pylant had told her that he had asked her to let him know when she would return from sick leave, but that she did not remember him saying that. She said she felt well enough to return from sick leave early.

Hawkins explained that the reason Pylant wanted Schulz to inform him of when she was coming back from sick leave was because, with both her and Alaniz out, they had hired a temporary secretary for two weeks, and it was unfair to ask her to work for two weeks and then let her go after seven days.

Schulz told Hawkins that Pylant was picking on her and trying to run her off by requesting her to do things that were not her job. For example, Pylant had asked her to compile Vehicle Fuel Tickets. Hawkins responded that he was the one who had suggested she do that, and that he had selected her for the duty because she had the time to complete the task. He reminded her that she was hired to do what they wanted her to do, and not what she wanted to do. Hawkins then called Pylant and asked him to come to his office.

While they were waiting for Pylant, Hawkins reminded Schulz that going over her supervisor's head was a violation of personnel policy, and that she was expected to go through the chain of command. He further told Schulz that he thought her attitude was terrible, in that she resented any changes that were made and was very negative about those changes, to the point of refusing to make those changes. He told her that every employee working for the City of Vernon in recent years had undertaken new duties and had done so without complaint. Schulz replied, "Well, I can see that I'm not going to get anywhere here."

Pylant then arrived and explained that Schulz had called him the previous week and said that she might return early from sick-leave and show up for work on Wednesday. Pylant asked her to let him know on Tuesday, so that he could let the temporary secretary know one way or the other. When she did not call by 5:00 p.m. on Tuesday, he assumed that she was going to come back the following Monday, and informed the temporary secretary that he would need her through Friday. Pylant said that when Schulz showed up for work on

Wednesday, he asked her why she had not called, and she replied that he never told her to call. Pylant told her to go back home for the three remaining days without pay.

After hearing both sides of the story, Hawkins told Schulz that it was his opinion that either Schulz did not pay very close attention to what her supervisor told her or that she was directly ignoring his directives. He told her to go home for the three remaining sick days, but determined that she would be paid for those days.

The three then discussed Schulz' attitude and the problems she and Pylant were having. Pylant stated that he felt he had gone the extra mile in trying to get along with Schulz, that he did not expect any more from her than anyone else, and that when he requested her to do something, she either said she was not going to do it, maybe she would, or that it was not her duty. In reply, Schulz stated that she was being overworked. Hawkins noted that since the City of Vernon had arranged for a local dealer to handle bottled water arrangements for expectant mothers, Schulz's workload should have decreased significantly, and asked her how she was being overworked. She said that she answered the phone and typed reports. When asked how long it took to type up the reports, she stated that the water and sewer reports took about one hour each per month. Schulz' deposition reveals that she had an extra hour and a half to two hours of spare time a day to perform additional tasks.[1]

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[1]Defendant Pylant claims that Schulz had enough free time to conduct personal business during work hours, including making personal phone calls and conducting a business of selling cook-ware, but that he approached her about stopping those activities, she rebuked him, stating that when he, too, made personal phone calls. Pylant has also testified that, on occasion, "she would pull books and records unrelated to her job and stack them on her desk to give the appearance of being busy."

Hawkins also asked Schulz about the sick leave she had been taking, and Schulz repled that she was having trouble with her sciatic nerve. She stated that this was one of the reasons that she could not do the fuel tickets, because she had to walk out to the pumps to get the readings and she felt this was a man's job. The two gas pumps were located between fifty and seventy-five yards from the front door of the office where Schulz worked.

Pylant stated that he felt she could do the job as well as any man and that she just did not want to do the task. He further stated that it took Schulz most of the day, and sometimes a day and a half, to enter the tickets in the book and tally the totals, mainly because she would not use a calculator. When Schulz had been gone, however, an employee unfamiliar with the task had been able to complete it in forty-two minutes without any instructions. Schulz stated that it took her longer because she had to answer the phone.

Hawkins then told Schulz that he was concerned both about her attitude and her health problem. She stated that she was not misusing sick leave and that she could not afford to retire because she needed the health insurance the City of Vernon provided for her, and she could not afford to purchase it on her own. Hawkins responded that they could not keep her on the City of Vernon payroll just because of her insurance if she did not perform her job responsibilities.

Hawkins told Schulz that they were not trying to force her to retire nor to fire her, but that if she wanted to continue working for the City of Vernon, she must perform her job. He reiterated that he wanted to see an attitude adjustment from Schulz, and told her to report back Monday with the right attitude.

During the third week of April, Pylant reported to Hawkins that he was still having problems with Schulz. He reported that Schulz had shown a better attitude her first

couple of days back from sick leave, but now when he requested her to do something, she would reply, "we'll see," or "maybe." He also reported that she had made numerous mistakes in the vehicle's records. Hawkins told him to take Schulz off of the vehicle fuel and maintenance schedules because they could not afford the mistakes.

Around the same time, Hawkins spoke to Dale Havins ("Havins"), the Water Superintendent, who informed him that Schulz had been transposing numbers in the water reports, making them incorrect. Subsequently, this duty was taken away from Schulz as well.

On May 4, Hawkins discussed with the Assistant City Attorney, Kent Hudson ("Hudson"), how the City of Vernon was going to operate the Utility Collections Office after May 31, 1990, when Hazel Henry ("Henry") was set to retire. Henry was responsible for entering meter readings into a computer. Although there was a place to propose the purchase of an automated meter reading system, they would need someone to perform Henry's duties until that time. They thought there would be about a three month transitional period before the purchase of the automated system.

Hawkins thought that Schulz might do well in this position. Hawkins called Pylant and Hudson and asked them if they thought that Schulz could do the job, since she had previously worked with the meter books and had, at one time checked all meter readings. All three felt that Schulz would be capable of performing the job, and that her success would depend on her attitude. They also agreed that perhaps Schulz would be happier at the City of Vernon's City Hall ("City Hall") since she obviously resented Pylant. On a Friday, Pylant told Schulz that she would report to City Hall on Monday, where she would be under the supervision of Hudson.

On Monday morning, Schulz instead went to see Hawkins and said, "If you all are trying to get rid of me, why

don't you just fire me?" She said that Pylant had waited until 4:45 p.m. on Friday to tell her to report to City Hall, and that when she questioned him, he started yelling at her[2] and took her keys away from her.[3]

Hawkins told Schulz that they were not trying to fire her or run her off. He explained that by placing Schulz in the position at City Hall, they would not have to hire additional help. He also told Schulz that she was the logical choice for the job because of her previous work with the meter books. Additionally, since Alaniz had returned from maternity leave, they could spare Schulz at the warehouse. Schulz agreed to try the City Hall job, but stated that she did not like it because Pylant had waited until the last minute to tell her.

Two days later, Schulz returned to Hawkins' office and stated that she just did not think she could do the work they were asking her to do. She said that sitting in a chair all day made her sciatic nerve act up and she couldn't sleep at night because of the stress the City Hall job was creating. She asked if she could have a week off for vacation and then go back to work at the warehouse. Hawkins asked why entering the numbers on the computer caused her stress when it was really not different from operating a calculator, but Schulz said it was different and she couldn't do it.

Hawkins reluctantly agreed to let Schulz take vacation time and return to the warehouse job. He again chastised her for her bad attitude and told her that if she was determined not to learn the small amount of work at City Hall, then she was wasting her time and theirs. He informed her that now they

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[2]Pylant admits yelling at Schulz on two occasions: this one and another time, when he alleges that she refused to do a task which was assigned to her.

[3]Pylant's affidavit states that when he told her that she would be going to City Hall, he asked her for her warehouse keys, but Schulz refused, saying that she might come back to the warehouse on Monday.

would have to hire a temporary worker. Schulz suggested that Hawkins make Henry stay on at City Hall. But Hawkins informed Schulz that when an employee who has worked for twenty-eight years files for retirement to begin on a certain date, you do not tell her she has to continue working.

Hawkins then asked Schulz if she had thought about her own retirement. She said she could not retire because she could not afford the insurance. Hawkins said that one of the reasons they had moved her to City Hall was that they were trying to keep her busy to earn her pay. He also told her that when she retired they would not hire anyone to replace her, since one secretary at the warehouse was all that was needed.

Hawkins then told Schulz that he wanted a change in her attitude. He cited examples of situations where he had stated that he wanted things done a certain way and had found out later that she had refused to do the work as he had requested. He informed her that there were two things she could be fired for: saying "no," "maybe," or "we'll see," to any request made of her or continuing to violate personnel policy by bypassing her supervisor or Hawkins himself.[4]

When Schulz returned to the warehouse to her secretarial position, her typewriter, calculator, and other office equipment had been removed. She was given only a pad, a pen, a telephone and a two-way radio. She was told only to take messages.

On May 16, 1990, Schulz was placed on indefinite probation for violating personnel policy, specifically, for going out of the chain of command with her complaints and for

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[4]This last warning was in response to Schulz' having gone straight to a City Commissioner with her complaints. A direct violation of the City of Vernon's personnel policy.

insubordination.[5] On August 13, 1990, Hawkins informed Schulz by memorandum that, due to budget constraints, her position would be eliminated effective October 1, 1990. On September 18, 1990, Schulz signed retirement papers, effective September 20. 1990. The Respondents contend that Schulz' age did not have anything to do with the fact that her job position was eliminated. They also contend that if Schulz had accepted the other job positions offered her, she could still be working for the City of Vernon. They further contend they would have terminated a younger employee for the same violations of personnel policy committed by Schulz and that the only reason these steps were not taken was because Schulz was a long-time employee with the City of Vernon.

No one has actually filled Schulz' warehouse position, because her prior position no longer exists. Rather, Alaniz now performs both what used to be her own duties and what used to be Schulz' duties. Even though Alaniz is the only remaining warehouse secretary, she still has between twenty-five percent and fifty percent of her time free.

REASONS FOR DENYING THE PETITIONER OF WRIT OF CERTIORARI

I. THIS IS NOT A PROPER CASE FOR THIS COURT TO WRITE ON WITH REGARD TO THE USE OF SUMMARY JUDGMENT IN AGE DISCRIMINATION CASES DUE TO THE FACT THERE WAS NO WILLFUL VIOLATION OF THE ADEA BY THE RESPONDENTS AND THUS THE PETITIONER'S CLAIM WAS DISMISSED FOR FAILING TO FILE SUIT WITHIN THE APPLICABLE TWO YEAR STATUTE OF LIMITATION.

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[5]Schulz claims that she didn't know that going outside of the chain of command was a violation of personnel policy. However, Hawkins claims that not only was this policy in the personnel manual and that he told all employees of his policy, but that he had told her at their earlier meeting that going outside of the chain of command was a violation of personnel policy.

Schulz has brought before this Court a blurry argument that the standards employed by the lower federal courts are destroying what Schulz would term viable discrimination cases. Schulz in her argument does not specifically address the current case, other than to say that the case before the Court would be an excellent case for the Court to speak to the methods employed by the lower courts in providing summary judgment. Before addressing the individual questions presented by Schulz, it is important to inform this Court of the proceedings which took place at the district court level and at the Court of Appeals. The fact remains that this is not the proper case for the Court to write on with regard to the use of summary judgment in age discrimination cases.

As shown by the Opinion issued by the Federal District Court and the Opinion issued by the Fifth Circuit Court of Appeals, one of the main determining factors in the granting and affirmation of the Summary Judgment was the fact that there was not a finding of a willful violation of the ADEA by any of the Respondents. Due to that fact, the three year statute of limitation was not applicable and Schulz' suit was then barred by the two year statute of limitation. Schulz originally filed her suit on September 29, 1992. In order to avail oneself of the three year statute of limitation, there must be a willful violation of the ADEA.

It is well established that in ADEA claims, the cause of action accrues when a plaintiff knew or should have known that an adverse or discriminatory employment decision had been made, rather than the cause of action accruing on the actual final date of employment. Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498(1980); Clark v. Resistoflex Co., 854 F.2d 762, 765(5th Cir. 1988), 29 U.S.C. §255(a). It was undisputed in the case before this Court that Schulz was informed by a letter dated August 13, 1990, that her job position with the City of Vernon was being eliminated. Schulz' last day of employment with the City of Vernon was the last day of September 1990. The date that Schulz' cause of

action began accruing was August 13, 1990, the date that she received the letter informing her that her job position was being eliminated. Any suit which would fall under the two year statute of limitation would therefore have to be commenced on or before August 13, 1992. It is clear that in order for Schulz' case to have proceeded there would have been a requirement of a finding of a willful violation of the ADEA or her suit was barred by the applicable two year statute of limitation.

As both courts stated below, there was no finding of a violation of the ADEA, much less a willful violation of the ADEA. This honorable Court has recently had an opportunity to re-examine the definition of the term willful as it applies to an ADEA claim in the Hazen Paper Co. v. Biggins, 507 U.S. ___, 123 L.Ed.2d 338, 113 S.Ct. 1701 (1993) decision. In Hazen, this honorable Court essentially reaffirmed the definition of willfulness which had originally been arrived at in the 1985 case of Transworld Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985). In Thurston, this honorable Court stated that a willful violation of the ADEA occurs, "if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Thurston at 439 U.S. at 133 (1985); Powell v. Rockwell Intn'l Corp., 788 Fed.2d 279 (5th Cir. 1986). Both courts below found absolutely no evidence which would indicate that the City of Vernon, its employees, or agents knew or showed reckless disregard for the matter of whether their conduct was prohibited by the ADEA. The federal district court below stated in its opinion:

> There is no summary judgment evidence before the Court which indicates that the City of Vernon through its employees, Hawkins and Pylant, acted willfully in violating the ADEA.

Schulz v. Vernon, No. 7-92-CV-107-K, slip op. at 25 (N.D.Tx., Wichita Falls Division, April 19, 1994). The Fifth Circuit Court of Appeals stated in its Opinion "...Schulz ... failed to

demonstrate sufficient evidence that a violation of the ADEA occurred, much less the existence of a willful violation." Schulz v. Vernon, No. 94-10479, slip op. at 4 (5th Cir. January 12, 1995). The record from below is clear that Schulz did not set forth any evidence at all to show that there was a willful violation on the part of any of the Respondents. The items proffered by Schulz as showing a willful violation all failed wholly to show that there was a violation of the ADEA or a willful violation of the ADEA. The Record from the courts below speak for themselves to this particular matter. Absolutely no competent evidence was produced by Schulz. The Federal District Court was proper in granting the summary judgment and the Fifth Circuit was proper in affirming the trial courts granting of a summary judgment.

Because it is clear that one of the main grounds for the granting of the summary judgment was that Schulz' claim was barred by the applicable statute of limitation, this is not a proper case for this particular Court to expound upon or change the basis for the granting of summary judgment in age discrimination cases. This case was time barred due to the fact that it was not filed within the proper two year statute of limitation by the party plaintiff. The Respondents respectfully submit to this Court that they believe it is clear that no matter what arguments Schulz may make with regard to the various standards for granting summary judgment, the Respondents continue to maintain that summary judgment was proper due to the fact that Schulz did not file her suit within the applicable statute of limitations.

II. THE METHOD OF ANALYSIS EMPLOYED BY THE LOWER COURTS WAS PROPER.

Schulz has put forth a rather vague complaint that summary judgment practice as it relates to ADEA claims is improper. The basis for this claim is supported solely by two law review articles and no case authority. Schulz states that one of the reasons for granting the Writ is that the Federal

Courts are receiving serious criticisms for their misuse of summary judgment in the context of ADEA claims. However, Schulz fails to state with particularity from whom and where this criticism is coming. She simply makes vague generalities about the Plaintiff's bar in general. Schulz further puts forth a rather strange argument that she is aware of several cases which could easily be won before a jury but are lost in summary judgment proceedings. Schulz' counsel is obviously much more of a soothsayer than other counsel; as this Court is well aware, the outcome of any jury trial is anything but certain nor is there any such thing as a case that could be easily won before a jury. Schulz further stretches the perception that the granting of summary judgments could, in some way, speak for the bizarre actions of former-employees who turn and "slaughter persons at their former work-place." This is a ludicrous assumption on the part of Schulz and has absolutely no merit whatsoever. Schulz is attempting to psychoanalyze the irrational thoughts of various individuals. The only case cited by Schulz in her Petition for Writ of Certiorari is the Anderson v. Liberty Lobby, Inc. case wherein this Court set forth the various burdens for the parties in a summary judgment. Schulz states that this honorable Court has repeatedly urged the lower courts to be more sparing and careful in their granting of summary judgments. While this may be true, the Anderson case also sets forth specific matters which must be met in order for a summary judgment to be granted. It is very clear that this Court has stated that in order to prevail in a motion for summary judgment the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that the individual is entitled to a judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Fed.R.Civ.P. 56(c). Clearly the courts at all levels are very aware of the fact that the courts are the place where people seek redress. Only in those cases which do not meet the standard of having no genuine issue as to any material fact is there a granting of summary judgment. The courts at all levels are very attuned to the trilogy of the Anderson, Celotex, and Matshushita cases.

The standard of review and the method of analysis has been clearly set forth by this Court. Summary judgment is proper when the record establishes that no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a mater of law. Fed.R.Civ.P. 56(c). The evidence and the record are to be viewed in the light most favorable to the non-moving party. The party moving for summary judgment need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue on which the non-moving party bears the burden of proof. Celotex v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Rather, the party moving for summary judgment need only show that the party who bears the burden of proof has adduced no evidence to support an element essential to his case. Celotex v. Catrett, supra; Teply v. Mobile Oil Corp. 859, F.2d 375, 379 (5th Cir. 1988). It is well established that in an ADEA case the party bringing the lawsuit has the burden of proof to establish a prima facie case of age discrimination. It is clear that in the case currently before this Court, the party bringing the lawsuit, Schulz, did not meet the burden of showing a prima facie case of age discrimination. There was no evidence produced by Schulz at the trial court level showing any sort of age discrimination. It is clear from an examination of the record below that the Respondents showed that there was no evidence adduced by Schulz of a prima facie showing of age discrimination. Schulz did not set forth any evidence to support a showing of prima facie case of an age discrimination.

Even if Schulz had produced evidence of age discrimination, the Respondents put forth ample evidence of many non-discriminatory reasons for Schulz no longer being employed by the City of Vernon. Competent summary judgment evidence provided at the trial court level by the Respondents showed that Schulz had serious personality conflicts with her supervisor and that she was insubordinate in her attitude in that she repeatedly responded "we'll see" or "maybe" when her supervisor requested that she perform certain activities. This was in addition to Schulz' violation of

the City of Vernon's personnel policies with regard to the chain of commands regarding complaints. Competent evidence was shown that Schulz violated personnel policy, exhibited insubordinate behavior and refused to learn computer skills. Additionally, she refused other job positions which were offered to her and the City of Vernon was reducing its work-force. Schulz worked in the warehouse as a secretary. The City of Vernon was reducing the number of people in its work-force and retained one person as the warehouse secretary. This person was better qualified in that she had better flexibility in learning new tasks, taking on responsibility, possessed computer skills, and now performs both the job she previously held along with that of Schulz. It is clear from the record below, that there was ample evidence presented which showed that there were many nondiscriminatory reasons for the actions of the City of Vernon. This Court should remember that the record below shows that Schulz actually retired from her position rather than being fired. It is well established that the City of Vernon has set forth nondiscriminatory reasons for Schulz' dismissal, the burden then shifts back to Schulz to set forth that the nondiscriminatory reasons set forth by the City of Vernon were pretextual. Again, on this particular issue, the burden of proof falls upon the party bringing the lawsuit. Thus, it is back to the Celotex standard of the party moving for summary judgment need only show that the party who bears the burden of proof has adduced no evidence to support an element essential to his case. Schulz was required and should be required to establish the existence of a discrete fact which shows some nexus between the employment action taken by the employer and the employees age. The simple assertion that a connection exists will not suffice. Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir. 1993). Schulz put forward no summary judgment evidence other than her bald assertion that there was a nexus between her age and the action undertaken by the City of Vernon. This should not suffice. At the trial court level, Schulz merely provided assertions that she was discharged because of her age. The various reasons set forth by Schulz are the sixteen reasons she set forth in her Petition for Writ of

Certiorari. While Respondents will address each one of those and has addressed each of those at all levels of this proceeding, a sample of Schulz' bald assertions that she was discharged for age comes in the form of two letters which she received. On April 25, 1990 and August 24, 1988, she received letters from the City Manager's office informing her that she would become or was eligible for retirement before January 1, 1990; and requesting that she designate beneficiaries. Schulz asserted that the letters showed discriminatory intent. Far from a discriminatory intent it merely showed that she was eligible for retirement benefits and asked that she designate a beneficiary. Simple bald assertions at no point should be considered as a basis for establishing a nexus between the actions taken and some discriminatory intent. Testimony by an employee regarding their subjective belief that their termination resulted from age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, non-discriminatory reason for their release. Molinar v. Ebasco Constructors, Inc., 986 F.2d 115 (5th Cir. 1993).

The main basis for Schulz requesting this Court to review the basis upon which summary judgments are granted in ADEA claims comes from a Boston College Law Review article entitled Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases. 34 Boston College Law Review 203 (March 1993). Even in this article, which proposes a new method of determining when summary judgments are proper in ADEA, proposes a sliding scale approach would be more appropriate. Even the article states that when the defendants have documentary proof and the plaintiffs have a bare bones prima facie case, then summary judgment would still be proper. In the case before the Court, the Respondents' articulation at the trial court level included much more than bare assertions. It included specific and strong summary judgment evidence showing that Schulz had not created any sort of material fact issue on the grounds that she bore the burden. It is questioned by the Respondents and was questioned by the lower courts

whether or not Schulz established a prima facie case. In the case before this Court, the Respondents offered proof that Schulz would have to rebut at trial in order to win, but Schulz responded with insufficient evidence for a reasonable jury to find in her favor. Even under the sliding scale approach recommended by the Boston College Law Review Article, summary judgment would still be proper. It must be remembered that the solitary function in the employment discrimination arena is that summary judgment allows apparently meritless cases to be nipped in the bud where there is only an attenuated possibility that a jury would infer a discriminatory motive. Amburgy v. Cohart Refractories Corp., Inc., 936 F.2d 805, 814 (5th Cir. 1991). It also must be remembered that the court has spoken on this issue. Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence with the existence of a genuine fact issue. Matshushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Anderson 477 U.S. at 257. Simple bald assertions are not enough nor should they ever be enough. While a plaintiff should not be forced to prove his case in response to a summary judgment motion, there are multiple safeguards in place for a party responding to a motion for summary judgment. These include the fact that the evidence and record are viewed in the light most favorable to the non-moving party and the moving party has the ultimate burden of demonstrating through competent evidence that no genuine issue as to any material fact exists.

III. THERE HAS BEEN NOTHING IN THE HISTORY OF THIS CASE TO SHOW THAT THE SUMMARY JUDGMENT EVIDENCE PRESENTED BY SCHULZ HAS BEEN OBSCURED.

Schulz states in her Writ for Certiorari to this Court the following items are occurring:

1. Courts are automatically crediting defendant's reasons,

2. Courts are drawing inferences in defendants' favor,

3. Courts are deciding witnesses' credibility on paper, and

4. Courts are requiring plaintiffs to prove their cases at the summary judgment stage.

Again, just as occurred at the trial court level, these are bald assertions made by Schulz. Schulz has made vague statements and pointed to nothing in this case which supports her position. It appears that Schulz is relying upon sixteen separate reasons as to why Schulz should have survived summary judgment and received a favorable jury verdict with regard to age discrimination. Each one of these sixteen points are addressed by the Respondents and it is shown that none of these show a willful violation of the ADEA, nor do they show any violation of the ADEA. The sixteen points and the response thereto are as follows:

1. Schulz claims that the sending of letters asking her to designate her beneficiaries on her retirement plan is evidence of willful age discrimination on the part of the City of Vernon. The letters received by Schulz did request that she designate beneficiaries on her retirement plan. Schulz received four letters regarding the designation of beneficiaries. The first designation of co-beneficiaries was executed by Schulz on October 5, 1979; the second designation of co-beneficiaries was executed by Schulz on July 8, 1987; and the August 24, 1988, and April 25, 1990, letters are simply form letters to all employees who are eligible for retirement informing them what could occur should an individual die before they receive their retirement. Schulz put

forward no competent summary judgment evidence other than her bald assertion that these letters, sent to all employees, are done with an intent to discriminate. In no way does the designation of a beneficiary or a request for an individual who will be eligible for retirement to designate a beneficiary in case of the actual employee's death, in any way reflect an intent to willfully discriminate against an individual. The City of Vernon put forward competent summary judgment evidence showing that these letters are anything but willful attempts to discriminate. These letters are merely form letters requesting an individual to designate beneficiaries.

2. Schulz claims that the fact that the City Manager asked her in January 1990 about her retirement plans constitutes a willful violation of the ADEA. The record below shows that the reason the City Manager inquired as to Schulz' retirement plans stemmed from the fact that the other warehouse secretary, Rosa Alaniz, was taking maternity leave and in order to effectively plan for staffing the City of Vernon needed to know Schulz' intentions. Schulz would become eligible for retirement on January 1, 1990. If Schulz would have retired while the other warehouse secretary was on maternity leave, then the warehouse would have been left in a situation where there was no secretary. It is certainly not a showing of an intentional or willful discriminatory act on the part of the City of Vernon for its City Manager to inquire of an employee who is eligible for retirement if that employee plans to retire. The City Manager was simply attempting to effectively plan for the efficient operation of his City. The Record of this cause shows competent evidence was put forward to show that there was no willful violation by Mr. Hawkins' inquiry.

3. Schulz states that a negative attitude was expressed by the City Manager when she gave a joking answer to his inquiry in January 1990 as to her retirement plans. Competent summary judgment evidence filed with the City of Vernon, Hawkins, and Pylant's Motion for Summary Judgment clearly shows that Schulz answered that she was not going to tell the City Manager when she planned to retire and she just might wait until Alaniz was on maternity leave and one morning not return to work. To a city manager attempting to efficiently and effectively operate a city, this is not a joking matter. The manner in which a city is staffed and run is not something to be joked about. The answer given by Schulz was treated as a serious response due to the serious nature of the interests involved. The evidence produced at the trial court level clearly shows that Schulz did not receive a negative answer from the City Manager, it was merely an answer that stated if she planned to retire he would appreciate the appropriate thirty days notice of retirement in order to file the papers which were required. Obviously, statements of this nature go directly to the attitude Schulz portrayed towards her work and are certainly to be taken seriously by a city manager attempting to plan and coordinate city staffing functions. It certainly does not show a willful or intentional violation of the ADEA, rather it shows an attempt to efficiently run, manage, and organize the staff of a city.

4. Schulz states that there was an insistence that she be required to tell the City of Vernon her retirement plans in January 1990. There is nothing in the Record below nor was there anything presented by Schulz as competent summary judgment evidence to show that the City of Vernon forced or insisted that she had to tell the City of Vernon about retirement plans. Again, the City of Vernon was merely attempting to effectively

plan and coordinate staffing for a time when another employee would be on maternity leave. There is nothing in the record, nor was anything presented by Schulz to show any sort of willful or intentional violation of the ADEA by the attempts of Paul Hawkins to secure knowledge of Schulz' retirement plans.

5. Schulz states that at the April 1990 meeting between Schulz and Mr. Hawkins, that a willful or intentionally discriminatory intent was shown by the fact that Mr. Hawkins discussed retirement and disciplinary procedures in the same conversation with Schulz. In looking at the whole of this conversation and its meaning, it is shown that Mr. Hawkins specifically states that neither he nor the City of Vernon were attempting to force Schulz to retire, nor were they attempting to terminate her. This meeting simply consisted of the City Manager speaking to an employee about the consequences of her continued poor attitude, refusal of instruction, and her displays of insubordination towards her supervisor. This conversation is dealt with in the Affidavit of Paul Hawkins, City Manager, which was attached to Defendants' Motion for Summary Judgment.

6. Schulz claims that the May 1990 discussion with Hawkins wherein he asked Schulz about retirement shows a willful or intentional act of discrimination on the part of the City of Vernon. It is clear from Respondents' summary judgment evidence that the May 1990 discussion with Schulz concerning retirement stems directly from her refusal to attempt to do her job at City Hall. Schulz, in her Brief, has conveniently plucked those phrases from the Affidavit of Paul Hawkins produced as summary judgment evidence that she claims support acts of intentional violations of the ADEA. Schulz does not look at the context as a

whole, such as in this instance. This may stem from the fact that Schulz has presented no competent summary judgment evidence on her own showing willful or intentional violations of the ADEA. In this instance, the claim that Mr. Hawkins told Schulz that she would have to work in order to keep her health insurance in no way shows a discriminatory attitude with regard to Schulz' age. It merely shows that a city manager is requesting an employee to perform his required work.

7. The competent summary judgment evidence presented by the City of Vernon shows that it was discussed with Schulz that she would be doing both her job and the other warehouse secretary, Rosa Alaniz's, job while Ms. Alaniz was on maternity leave. It is strange that Schulz makes the claim that she was unable to do the work covering both of these jobs. However, Schulz' deposition testimony states that she was able to do all of the work required of her plus she had between one and a half hours to two hours of free time per day. The deposition testimony of Rosa Alaniz shows that she now performs all of the duties of both herself and those previously assigned to Schulz and is able to complete all the work assigned to her. There is nothing presented by Schulz to show any kind of willful or intentional discrimination on the part of the City of Vernon by requesting Schulz to fill in and handle the secretarial duties of her co-worker while her co-worker was on maternity leave.

8. The Affidavits of Paul Hawkins and Marshall Pylant, which were attached to Respondents' Motion for Summary Judgment, both show evidence that upon discovery of Schulz' failure to properly prepare her assigned reports, the reports were immediately removed from her job duties and she was informed of her errors. The job at City Hall merely required

Schulz to input numbers much in the same fashion as a ten-key or calculator method. The job did not require computer experience, it merely required the pushing of buttons to input numbers. The job at City Hall had nothing to do with the addition and balancing of numbers as did the reports Schulz was previously responsible for preparing. Again, this does not show an intent or a willful violation of the ADEA. It must be remembered that in order to be a willful violation there must be a showing that a defendant knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. There has been no showing that the City of Vernon committed any act prohibited by the ADEA.

9. The job at the Water Department (City Hall) had every possibility of becoming a permanent position and one in which, had Schulz taken the job, Schulz could still have been employed to this date. Competent summary judgment evidence was presented on this point by the City of Vernon. The fact that the City of Vernon attempted to find Schulz another job position within the City of Vernon does not show a willful intent to violate the ADEA. In fact, it shows just the opposite. The City of Vernon was attempting to retain Schulz as an employee in some capacity.

10. Schulz complains that assigning her to a computer job when she did not have computer experience of any significance shows an intentional discrimination of the part of the City of Vernon. This goes to the fact that Schulz was not as qualified as her co-worker in the warehouse. Schulz' assignment to City Hall did not require computer knowledge and merely required the input in ten-key fashion of numbers. It was repeatedly emphasized to Schulz that she would be trained for the data entry job. The fact that the City of Vernon attempted to place Schulz in another job does not

show that the City of Vernon knew or should have known their conduct was violating the ADEA. The City of Vernon believed that Schulz had experience with a ten-key and that this would give her an opportunity to get out of the warehouse while still keeping her as a City of Vernon employee.

11. Schulz states that her job was the only reduction in force which caused the layoff of an existing employee. This assertion is blatantly false and has no support anywhere in the Record. The evidence below shows that two Parks Department positions and a Water Department position were eliminated in the very same budgetary restraints that required the elimination of Schulz' position. Additionally, there were thirteen other positions which were eliminated or that were not filled once vacated. It is clear from the evidence below that the City of Vernon was in a reduction mode in cutting back the number of individuals employed. In fact, in Schulz' deposition she states that in 1990 she was aware there was a reduction in work force taking place at the City of Vernon.

12. There is no evidence in the Record to show that anyone ever yelled at Schulz. The deposition testimony of Schulz points out only two particular occasions of confrontation between Schulz and any employee of the City of Vernon and neither of these instances would rise to any level above an employment disagreement. Schulz claims all these instances but does not put forth any specifics as to the incidences. Further, this does not show any sort of willful or intention to violate the ADEA on the part of the City of Vernon. The Affidavit of Marshall Pylant speaks of two occasions wherein he raised his voice to Schulz. Both of these occasions came when Schulz refused to do those tasks which were her job responsibility. The fact that Pylant

raised his voice to an insubordinate employee does not constitute evidence of a violation of the ADEA.

13. Competent summary judgment testimony below showed that Schulz was asked to show up at City Hall for a job at that location. Because she would be working at City Hall she no longer needed keys to the City of Vernon's warehouse and she was requested to return her keys to the warehouse. The fact that Schulz was requested to return keys to a building where she would no longer be working does not show a willful or intentional violation of the ADEA on the part of the City of Vernon. Further, Schulz has not shown by any competent evidence that this rises to the level of an intentional or willful violation of the ADEA.

14. The evidence below clearly shows that Schulz' poor attitude and refusal to do her job assignments and those tasks which made up her job led to a disciplinary probation period. During this disciplinary probation period, some of Schulz' job responsibilities were removed. This was due to the probation brought upon Schulz after repeated warnings that her continued refusal to perform the jobs assigned to her would result in termination. Instead of termination, Schulz was placed on disciplinary probation. This does not show a willful or intentional violation of the ADEA. Schulz' age had absolutely nothing to do with this decision. The decision stemmed directly from the fact that she refused to do tasks which made up her job. The competent evidence clearly sets this forth.

15. The Affidavit of Pat Quisenberry, attached to Respondents' Motion for Summary Judgment, clearly shows that it was Schulz who went to Ms. Quisenberry and requested retirement benefit forms. Upon Schulz' return of the forms to the office, it was determined that the forms had been filled out in blue ink which

was improper as the forms were required to be filled out in black ink or typed. Schulz then obtained another set of retirement forms and filled out this set by typing and requested retirement benefits to commence on September 30, 1990.

16. The fact that Ms. Alaniz was retained as the lone warehouse secretary stemmed from her better qualifications, flexibility, and attitude. Schulz' attitude towards her job was not good and she questioned and complained about every job assignment given to her. Schulz admitted that she had a poor attitude. Further, it was discovered that all the reports completed by Schulz were being done incorrectly.

On many occasions, meetings were held with Schulz to discuss her attitude and work performance. Schulz conducted personal business and had repeated personal phone calls at work. Schulz claimed in the court below that she was able to do all the things that Ms. Alaniz was capable of and was willing to always "pitch [sic] hit" for Ms. Alaniz and help each other. However, Ms. Alaniz stated in her deposition that Schulz was not willing to help with other work, particularly purchase orders, because she was afraid she would make mistakes. This testimony is consistent with the fact that the City of Vernon attempted to assign and train Schulz for the purchase order responsibility, but Schulz refused because of the fact that computers were involved.

In the only summary judgment evidence presented by Schulz, her own self-serving affidavit, she states that she did not have computer experience. Schulz' co-worker, Ms. Alaniz, stated that Schulz did not want the job at City Hall because she did not want to learn or deal with computers. Schulz was given an opportunity to learn the job at City Hall which only

required her to input numbers into a computer. This job did not require computer knowledge, only the ability to enter numbers. Schulz was to be trained for this job by the outgoing employee for two weeks prior to the time Schulz would actually take over the input of numbers. Schulz completed one day of training and said that she could not do the job at City Hall. Schulz stated in her deposition that while she was on probation, just answering the phone and dispatching calls, she could not have handled other work.

It is clear that the City of Vernon did not commit any willful or intentional violation of the ADEA by retaining Ms. Alaniz and not retaining Schulz. Schulz' job was eliminated for budgetary constraints and for no other reason. Three other opportunities were presented to Schulz to move to other areas of employment by the City of Vernon and she for one reason or another refused.

The clear concise and competent summary judgment evidence presented by the City of Vernon at the District Court level clearly shows that there is no genuine issue of material fact to support any assertion or claim by Schulz that the termination of her job position with the City of Vernon was willful. Schulz presented no competent summary judgment evidence to show a willful violation of the ADEA. There has been nothing put before this Court to show the City of Vernon knew or should have known that any of their actions violated the ADEA. The City of Vernon presented affidavits and sworn deposition testimony of uninterested parties and Schulz herself, showing that there was no willful violation of the ADEA. Because there was no willful violation of the ADEA, the opinion expressed in the Memorandum Opinion and Order of the courts below are correct in holding that there is no evidence before this honorable Court which

indicates that the City of Vernon, through its employees, acted willfully in violating the ADEA. Therefore, the two year statute of limitation would apply to this case. Since suit was not filed within two years of the date on which Schulz knew or should have known of the City of Vernon's alleged discriminatory intent, this suit is barred by the statute of limitations.

There has been nothing presented by the Petitioner which would warrant this Court reviewing the method by which summary judgments are granted in age discrimination cases. This Court has spoken in the past as to how summary judgment practice is to be handled and the Courts previous recitations should stand.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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